In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 663

ROBERT MOORE, RICHARD McCOARD, GEORGE SHERRAD and JOE PIMENTEL,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITIONERS' REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Table of Authorities Cited

SUMMARY OF REPLY.

RESPONDENT IN OPPOSITION BRIEF BEGS THE QUESTION AT ISSUE AND ASSUMES THE CONCLUSION TO BE PROVED.

1. Respondent assumes picketing in question to be illegal, which is contrary presumption of innocence, and contrary right of peaceful picketing under the First and Fourteenth Amendments.

2. Respondent assumes that defendants were a party to an antecedent unlawful agreement and that evidence of acts of others present is competent to convict defendants just as though they were charged with a conspiracy to commit the series of separate felonies described in the indictment herein, and this notwithstanding that the indictment charges commission of a specific offense and is silent with respect to conspiracy.

3. Respondent assumes that although the indictment herein charges an act specifically described, conviction may be established by proof of commission of the offense by means of other and different acts.

4. Respondent assumes that the trial of these defendants charged specifically and convicted by proof of acts of other parties involves mere local California laws, and not rights under the Constitution of the United States.

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An examination of the brief of respondent in opposition to petitions for writ of certiorari in both the instant case of Robert Moore, et al. against the People of the State of California (Docket No. this Court 663) and the case of Bundte, et al. against the People of the State of California (Docket No. this Court 662)* convinces us that the positions earnestly urged

*Since the brief in the Bundte case has been served upon us only today, time does not permit separate treatment, but since the issues in both cases are largely identical, this brief may serve as our reply in both cases.

in our petitions and supporting brief remain unimpaired. There is, however, such a grave misapprehension evidenced in respondent's brief with respect to the principle of constitutional law upon which we rely, that we feel impelled briefly to redefine our position and to point out the error upon which, as we conceive it, the respondent People of the State of California in these instant cases have proceeded.

It has been our position throughout these entire proceedings and it is our position before this Court that these defendants have a right to be charged in the indictment with a specification of the crime for which they are held to answer; that the proof, if any, offered by the state in support of such charge must be proof evidentiary of that particular offense and none other; moreover, that it must be proof that the particular defendant, charged with a particularized offense, committed the act thus described, and that conviction upon proof that someone else committed the act or that the defendant committed another and different act than that specified would be fatally violative of due process guaranteed under the Fourteenth Amendment of the Constitution of the United States.

The fallacy which underlies the prosecution and the conviction in this case, as we see it, is the wholly gratuitous assumption that these defendants at the time and place laid in the indictment were engaged in an unlawful preconcerted plan to commit a crime. The plain and simple fact in this case is that some thirty or forty pickets on the two occasions forming the subject matter of this prosecution were present

for purposes of engaging in picketing in the course of a labor dispute and a prolonged strike in the redwood lumber industry. The record itself shows that the entire course of picketing throughout the period of the strike had been remarkably free from violence. The evidence in these two cases shows indisputably that a substantial majority of all of the pickets present remained throughout entirely peaceful and refrained from any act whatsoever of violence. The evidence does show that for a few brief moments, first at Hollow Tree January 30th and again at Richards ons 75 miles away, February 4th, certain pickets threw rocks. Many of those who threw were not identified. The evidence even conclusively establishes that some of these defendants threw no rocks whatsoever in a considerable number of counts of felony charging assault against certain persons specifically named therein. This appears by the confession of the District Attorney on the consideration of defendants' motion of dismissal and advisory verdict. This we have documented in our petition herein, pages 14 and 15.

It remains then to inquire upon what premise the trial court and the California Appellate Court could have sustained convictions with respect to those counts. The theory upon which such convictions rests appears clearly in the record and constitutes the very vice which we urge as a violation of constitutional due process. The trial Court submitted this case to the jury not upon the theory that these defendants were guilty not only upon proof of their particular acts but upon the premise that they were guilty of any and all acts

committed on the occasion in question by any and all of the thirty or forty parties then present on the picket line. This was upon the postulate which the trial Court expressly formulated and declared that everyone then present was present pursuant to an unlawful plan and purpose and agreement to commit acts of violence. The trial Court divorced from any consideration by the jury any possibility that these men might have been present in pursuance of their lawful and constitutional right of peaceful picketing. The trial court persisted in doing so despite the fact that there was no charge in the indictment that the defendants were parties to a conspiracy or for that matter, that they acted for the purpose of aiding and abetting others to commit unlawful acts. The trial Court simply took it for granted that all the persons were there for an unlawful purpose.

During argument on the motion for advisory verdict counsel for defendants sought to point out this error to the trial Court. The entire argument appears in the T.R. pages 227 to 256. Counsel for defense pointed out to the Court that the offence here charged in the indictment was a specific assault by means of a deadly weapon, to-wit, throwing a rock at a particularly named person, that there was no charge nor was there any proof that the pickets assembled for anything other than their lawful constitutional right to engage peacefully in picketing and that the Court in invoking the aid of Penal Code 31 presumed as a premise something not charged in the indictment nor proven by any evidence whatsoever, that is, that the

entire assembly of pickets was pursuant to an unlawful conspiracy, purpose or design. Said the Court, illustrative of the Court's trial theory (T.R. 243):

"The Court. I recall an occasion when there were four Indians came over the hill from the Indian rancheria to rob an old Italian of his wine. One had been there in the afternoon, and he got a little mixture with the wine in his blood, and he was pretty thirsty that evening, and they had a big party over at the Indian rancheria and they came back over there. Now, they came over there with *the sole intent of getting the old fellow's wine,* but they came to the wine cellar and they found it locked. They couldn't get in.

So then they had to get the key from the old gentleman himself, who was sleeping nearby in his home. So they went to the door. The evidence showed clearly that they didn't intend to kill the old man, but one of these young fellows had a pistol, and he put a handkerchief over his face and they went to the door, and he knocked on the door. And the old fellow came to the door, and he demanded his key to the wine cellar, and shoved this pistol at him. The old fellow immediately saw what was going on and he turned on his heel, to get a gun or a weapon or something and this young Indian, excited, pulled the trigger, and he killed the old Italian. The defendants, all four Indians were charged with the murder on the theory that they were all there and concerned in the commission of the crime, and while they were concemed with the commission of this felony, this man was murdered and made them all guilty.

Now, I just cite that because I remember I went through that case very carefully and I think three of them were convicted."

"Mr. Flood. I can appreciate that case. Because all four of them went out in the first place to commit an illegal enterprise, and in the commission of the illegal enterprise, they committed an additional and other crime, and therefore, were guilty of that other crime. But had all four of them gone over there for the purpose of politely asking the Italian to lend them or give them a gallon of his wine and one of them after they got there decided to steal the barrel of wine, the fact the other four were associated with him in the initial enterprise that was innocent in its inception, would not make murderers of the other four."

* * * * * * *

"Mr. Flood. The mere fact the eight or nine cars came through in the five or ten minutes, whatever, five or six minutes, whatever it was, is not sufficient to convict someone at the west gate for rocks thrown at the east gate.

Or is not sufficient to convict someone for throwing a rock at Pullen, when it is conceded in the evidence that he wasn't present when Pullen came through and did not throw rocks at Pullen.

Now, if you are charging a different crime, if you had charged a conspiracy to go out there and rock all cars that went through, everybody there, whether he threw a rock or not, would be guilty, as long as one of them committed an overt act. But you haven't charged that crime here and therefore the proof that would be admissible under such a crime is not competent here."

The theory upon which the trial Court submitted this case to the jury partakes, we respectfully submit, of the very essence of the vice of "mass conviction" and of "guilty by association." It *presumes* a guilty plan or purpose without requiring that it be charged or specified in the indictment or that there be affirmative proof thereof. It denied defendants engaged in picketing—in fact it denies to all pickets assembled on the picket line—the constitutional presumption of innocence. Moreover, it strips them of their constitutional right of peaceful picketing. It renders the right of each to engage in peaceful picketing subject to the precarious risk of whether some other picket there assembled commits an individual offense. In other words, it renders the right of peaceful picketing, guaranteed in broad terms by the First Amendment, a *qualified provisional* or *conditional* right only.

We have also urged that the theory under which the trial Court imported Penal Code 31—entirely out of its context as we contend—enabled the jury to find defendants guilty even in those cases where it is manifest under the evidence in the record that they did not personally participate in the assaults constituting the subject matter of felony counts charged against them. It enabled the jury to convict the defendants in such cases upon proof that others committed the acts thus charged. This is the very essence of the principle of vicarious guilt traditionally condemned in Anglo-American law.

There is a further repercussion resulting from the Court's application of Penal Code 31 which operated

to impinge upon petitioners' constitutional rights. By the force of that instruction they were denied the benefit of having thoroughly discredited the testimony of two of the prosecution's identifying witnesses, that is, the testimony of Ray and Gibson. An analysis of the testimony with respect to each of the felony counts serves to demonstrate that but for their testimony proof as to counts 2, 4, 7, 8 and 9 would have failed entirely. Proof as to these defendants would have failed also in certain of the remaining counts. Certainly the testimony of witnesses Gibson and Ray undertaking to identify each and all of these defendants as having thrown rocks was effectively discredited. It appears that they were stationed some 600 feet away from the events that were purported to have occurred, intervening lumber piles obstructed their vision, the morning was foggy and subject to poor visibility. On the morning that the offences were alleged to have occurred they were unable to identify a single one of these defendants or to point them out either to the local municipal Chief of Police or to the state highway patrolmen then present. (R.T. pages 71, 281, 288, 416.) It is the confident judgment of petitioners that their testimony was so thoroughly refuted as to entitle them to an acquittal by the jury in those counts where the proof rested upon their identification alone. Acquittal, however, was rendered virtually impossible the moment the trial Court instructed the jury that irrespective of the absence of proof of personal participation on their part, they were none the less guilty so long as they were present at the time that others,

unnamed and anonymous amongst the thirty or forty then there committed the assaults thus charged.

We do not subscribe to respondent's position that there was evidence establishing that each of these defendants participated personally in committing assaults by throwing rocks. We shall not pause here to screen the record for the purpose of demonstrating what we assert to be the fact—that there is no proof in the record showing that each defendant threw a rock or rocks in each count as charged in the indictment. Put in another way, if these defendants were to be held guilty only upon proof that they threw rocks in each of the counts as charged, the Court would necessarily have been compelled to grant a dismissal on our motion of advisory verdict as we have heretofore set forth both in the opening petition and in this reply.

Assuming arguendo respondent's contention that there is such evidence in the record, such argument still fails to meet our objection that it violates petitioners' constitutional rights of due process. If respondent's position be argumentatively assumed as sound, then the case should have gone to the jury upon the evidence, such as it was, that these defendants perpetrated the acts thus specifically described in the indictment—and upon no other evidence. To fortify or bolster a conviction upon the charge that a defendant committed a specific assault by evidence that another named party, not a defendant herein, committed the act and that defendant was merely present is an incalculable transgression upon the constitutional

right to be notified exactly of the charge against which a defendant must defend and to be held responsible only for evidence in support of that charge and none other.

Certainly respondent cannot contend, and that is the logical result of its position, that the vast volume of testimony relating to rocks thrown by others than these defendants and the admission of specific exhibits conceded to be rocks thrown by others is merely harmless error. It needs no argument to establish the fact that such testimony is gravely prejudicial and that it can only have the effect of inflaming and influencing the minds of the jurors to the extent that they minimize, neglect and overlook the failure to establish direct proof of defendant's guilt and readily resort to inferences of vicarious guilt.

Respondent in its opposition brief betrays again the error into which, as we conceive it, it has fallen. It treats this case as equivalent to a trial under an indictment for conspiracy. It proceeds upon the assumption that in this indictment the failure of proof of a defendant's guilt in a particular count is cured by the omnibus application of Penal Code 31, thereby is imported all of the body and substance of the law of conspiracy so that a defendant may be convicted not upon proof of his own acts but by irrelevant proof of the acts and declarations of others. Says respondent in its brief, page 11:

> "Conspiracy or concert of action comprehend nothing that is not included in the definition of 'who are principals' (People v. LeGrant, 76 Cal. App. 2d 148)."

However valid that assertion may be within the context of the *LeGrant* case, it falls entirely short of introducing the law of conspiracy into the instant case. It did not say nor does it mean to hold the Penal Code 31 or the law of punishing aiders and abettors as participants is merely a shorthand expression synonymous with conspiracy. It still remains the law that a conspiracy to be proven must first be charged. Unless the antecedent agreement which forms the gist of the conspiracy be first charged and proven, it is fundamental that evidence of the acts and declarations of others to charge a particular defendant is inadmissible and incompetent. Yet respondent here has rested throughout these entire proceedings upon the premise that the law of conspiracy is interchangeable with that of aiding and abetting. It must be borne in mind that each of the nine felony counts against each of these defendants constituted in the Moore case, thirty-six separate and distinct crimes or felonies and in the Bundte case, eighteen separate and distinct felonies. These defendants were entitled to go to the jury upon evidence, and legal evidence only, relating to each of these thirty-six or eighteen counts. It could very well be, and in this case was the fact that as to some of these counts there was no evidence whatsoever of personal participation of some defendants nor any evidence of aiding and abetting. We shall not here labor the point, but when carefully considered, this serves logically and completely to distinguish the rule relied upon by the respondents and announced in *People v. LeGrant,* 76 Cal. App. (2d) 148. That case, after

all, merely held that where one is charged in the general terms of the statute of having committed a single crime such as murder and he can be convicted of committing that crime by either of the two methods condemned by the statute, that is, by proof that he did so personally, or that with knowledge he aided and abetted. Such a rule does not permit evidence as to one of thirty-six felony counts to serve *per se* as a valid basis for a defendant's conviction in each of the other thirty-five counts.

The reach and import of this constitutional issue does not permit respondent to treat it, as respondent attempts, merely as a question of local California law. It reaches deeply to the very heart of the requisites of constitutional due process. This Court has recently been very sensitive to review convictions in cases involving vicarious guilt or mass convictions. Even in cases where conspiracies are spelled out in the indictments—and none here was charged whatsoever—this Court has recognized that the law of conspiracy is one *sui generis* and for that reason that it must not be allowed to extend beyond its limited scope and function. A notable case most recently illustrating this principle is that of *Krulewitch v. United States*, (Mar. 28, 1949) 336 U.S. 440, 93 L. ed. 623, 69 Sup. Ct. 716. A majority opinion written by Mr. Justice Black rejected the theory of implied guilt. The concurring opinion of Mr. Justice Jackson was an illuminating analysis of the prejudice resulting from permitting the doctrine of the law of conspiracy to be expanded beyond its purpose or logic. Significantly he declared

"Thus the conspiracy doctrine will incriminate persons on the fringe of offending who would not be guilty of aiding and abetting or becoming an accessory, for those charges only lie when an act which is a crime has actually been committed." Again, he said "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together," and while Mr. Justice Jackson spoke only in that case of a federal statute, the principle which he announced in the words to follow applies with equal force as a matter of fundamental fair play and constitutional law to all criminal trials. "No statute authorizes federal judges to imply, presume or construct a conspiracy except as one may be found from evidence * * * and at all events it is one fundamentally and irreconcilably at war with our presumption of innocence * * * we should disapprove the doctrine of implied or constructive crime in its entirety in every manifestation."

May we then conclude our presentation of this matter to this Court by reiterating that the issue here present is by no means a matter of local law of concern to California Courts only. It presents a problem common to practically all states in the union and equally present throughout the various federal jurisdictions by reason of statutes in the various states and acts of Congress. What is here at stake is the problem

of checking the elasticity and expansibility of a statute such as Penal Code 31 and permitting it to be employed not for the purpose which motivated the majority in enacting it, to-wit rendering one who is convicted upon a proper charge of aiding and abetting as guilty of a substantive crime as if he were charged as a principal, but of expanding the statute to make it serve as the equivalent of a charge under the law of conspiracy and at the same time to do away even with those logical safeguards which have been thrown around the admissibility and competency of evidence under the law of conspiracy. The problem here which we ask this Honorable Court to resolve is to reaffirm said fundamental rights vouchsafed by the Constitution, to-wit: to reaffirm the right to engage in peaceful picketing in connection with a labor dispute as an exercise of the right of freedom of speech and to exercise this right without fear of criminal liability by innocent pickets for unlawful acts of others who may be assembled for the purpose of picketing; also the right of a defendant in such a case as the one at bar, to be precisely informed of the nature of the offense charged against him and to be convicted, if at all, only upon proof of that particular offense and none other; the right to the guarantee and protection of the principle of the presumption of innocence rather than an assumption or presumption of vicarious guilt or of guilt by association.

Petitioners ask that their petition for writ of certiorari be granted.

Dated, May 18, 1949.

Respectfully submitted,

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